Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States
October term, 2001 - 2002

Sandra Murphy

Appellant,

vs.

Jack Binion, James Brown and
Bonnie Binion

In the Matter of the
Estate of Lonnie Ted Binion

Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Sandra Murphy
I.D. #066764
Southern Nevada Women's Correctional Facility
4370 Smiley Road
North Las Vegas, Nevada 89117
Appellant in Pro Se

60 pp

QUESTIONS PRESENTED

1. Whether an alleged telephone call by the testator to his attorney requesting the attorney to delete a beneficiary by obliterating that portion of the codicil is a valid amendment or revocation of the codicil?

2. Whether a codicil can be obliterated in part and retained in part by a telephone call?

3. Whether a change in the statute correcting an error in its language operates retrospectively?

4. Whether a telephone call by a testator to his attorney with instructions to delete a beneficiary is a second codicil?

5. Whether a second codicil deleting a beneficiary must be in writing?

6. Whether NRS 133.120 is so vague that it allows an unlawful taking of property which has passed to the beneficiary at the time of death in violation of both Amendment 5 and Amendment 14 to the United States Constitution?

7. Whether NRS 133.120 as it existed in 1998 and prior to its amendment in 1999 is fundamentally unfair and therefore denies procedural due process which is required by Amendment 14 to the United States Constitution, and as such, is repugnant to the United States Constitution?

8. Whether at the time a law is amended to correct an error in language ("or" for "and") the application of the law is retrospective, in operation and application?

9. Whether the highest court in the state may disregard a curative statute in rendering its decision?

LIST OF PARTIES

Petitioner consists of Sandra Murphy, the beneficiary under the will of Lonnie Ted Binion, now deceased.

Respondent consists of the Estate of Lonnie Ted Binion.

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OPINION BELOW

Petitioner seeks review of the opinion below filed by the Supreme Court of the State of Nevada on October 9, 2000.

The procedural history of this case includes a hearing before the District Court of the State of Nevada in and for the County of Clark, at which time the court, by and through the honorable Myron Leavitt, granted summary judgment to Sandra Murphy, the appellant herein.

The state court held:

"...that a telephone call to decedent attorney was not sufficient under Nevada revised statutes to revoke or amend the codicil executed by decedent on July 9, 1998."

The order was dated December 28, 1998

An appeal was timely filed by the estate and the Nevada Supreme Court rendered its opinion on October 9, 2000, reversing the opinion of lower court.

This appeal follows.

JURISDICTION

The Supreme Court enjoys jurisdiction to review final judgments of the highest courts of the several states by virtue of 28 U.S.C. 1257 (a):

State courts; Certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The petition for Certiorari should be filed within 90 days of the highest courts opinion. The 90 days should commence to run from October 9, 2000. The petition is therefore due on or before January 8, 2000, and is timely filed by that date.

Service has been made on the respondents.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

NRS 133.120 Other means of revocation.

1. No will in writing shall be revoked unless:

(a) By burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence, or by his direction; or

(b) By some other will or codicil in writing, executed as prescribed in this chapter.

2. Nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.

[8:61:1862; B § 819; BH § 3007; C § 3078; RL § 6209; NCL § 9912]

NRS 133.040 Valid wills: Requirements of writing, subscription, witnesses and attestation. No will executed in this state, except such nuncupative wills and such holographic wills as are mentioned in this chapter, shall be valid unless it be in writing and signed by the testator, or by some person in his presence, and by his express direction, and attested by at least two competent witnesses, subscribing their names to the will in the presence of the testator.

NRS 133.010 "Will" includes "codicil." As used in this chapter, "will' shall be so construed as to include all codicils as well as wills.

U.S. CONSTITUTION

AMENDMENT V
[RIGHTS OF PERSONS]

Prosecution by presentment, indictment; double jeopardy; self-incrimination; due process; property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV
[RIGHTS OF CITIZENS]

Section 1. **Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amended version of NRS 133.120:

1. A written will may only be revoked by:

(a) Burning, tearing, canceling or obliterating the will, with the intention of revoking it, by the testator, or by some

person in the presence and at the direction of the testator; or

(b) Another will or codicil in writing, executed as prescribed in this chapter.

1999 Nev. Stat., ch. 467, § 83, at 2257 (emphasis added).

STATEMENT OF THE CASE

Lonnie Ted Binion ("Binion"), now deceased, left a Last Will and Testament dated May 16, 1996. On July 9, 1998, Binion executed the First Codicil to the Last Will and Testament ("First Codicil") wherein he deleted in their entirety all bequests to K. C. Harney, Mindy Michael Johnson, Aaron Claiborne, Marisa Beck, Janice Mahoney and Ulett Gonzaques. In their place, Binion bequeathed to Murphy the sum of Three Hundred Thousand and 00/100 Dollars ($300,000) "and the residence and contents located at 2408 Palomino, Las Vegas, Nevada." On September 16, 1998, the day before his death, Binion purportedly telephoned attorney James Brown ("Brown") and requested that he cancel the bequests to Sandra Murphy.

On October 20, 1998, Jack Binion as the executor ("Executor") filed a verified petition based upon his notarized signature praying for admission of the Will and First Codicil to probate. However, the executor also requested that the provisions relating to the disposition to Sandra Murphy contained within the First Codicil be canceled pursuant to the telephone call received by Brown from Binion. The Executor requested that Codicil be admitted to probate so the deletion of the previous specific bequests would remain in full force and effect, or, in other words, treat the obliteration as creating a second codicil ("Second Codicil") which it was now titled. On Nov. 6, 1998, the Probate Court admitted the Will to probate but withheld making a decision on the admission of the Codicil.

On Nov. 5, 1998, Murphy filed a Request for Enforcement of Will and First Codicil Thereto dated July 9, 1998. On Dec. 9, 1998, Murphy filed a Motion for Summary Judgment Declaring that the First Codicil to Will of Lonnie Ted Binion Is Valid; and Order Shortening Time. Murphy's Order Shortening Time was granted and a hearing was scheduled before Judge Leavitt on Dec. 18, 1998. The Estate objected to the Order Shortening Time on the Motion for Summary Judgment, however, the Estate was able to file an Opposition to the Motion eight days later on Dec. 17,

1998. As indicated in the Affidavit in Support of the Order Shortening Time, Judge Leavitt had indicated to the parties that he would hear any motions relating to this matter before he left the bench. Unfortunately, his last day on the bench was Dec. 18, 1998. However, no facts have changed nor was it necessary to supplement the record in any way (other than the adoption of the amendment to 133.120 (1)).

Murphy's Motion for Summary Judgment raised two issues. First, Murphy argued the First Codicil was valid and in existence at the time of Binion's death since the revocation did not occur until after Binion's death on September 16, 1998. Second, Murphy argued that even if Brown changed the First Codicil during the life of Binion, the revocation was not validly executed because the obliteration was not performed at Binion's direction **and** in his presence. (Emphasis supplied.) In support of her position for the use of the word "and," Murphy argued that the same formalities to execute a will (NRS 133.040) should also be followed in revoking a will under NRS 133.120. Additionally, Murphy argued that the use of the word "or" in NRS 133.120(1)(a) was a typographical error when the statute was first passed and, since it had never been challenged, no one corrected the statute to use the word "and" instead of "or."

Otherwise, an oral declaration could revoke a written will. By way of example only, Murphy referred to Section 2-507 of the Uniform Probate Code and to the statutes of the other Ninth Circuit states; California, Oklahoma, Arizona, Colorado, New Mexico, Utah, Wyoming, Oregon, Washington, Kansas, Montana and Idaho, all of which require the revocation to be at the testator's direction **and** in his presence. (Emphasis supplied) Furthermore, it had been represented to Murphy's attorney by the attorneys for the Estate that Nevada was the only state in the Union that used the word "or". For that reason, Murphy's attorneys made the statement in its Motion that every other statute in the United States used the word "and". The error has since been corrected by the state legislature.

On December 17, 1998, the Estate filed its Opposition to Murphy's Motion for Summary Judgment. In support of its Opposition, the Estate relied upon an affidavit from James Brown, wherein Brown testified that he complied with Binion's telephonic direction to cancel and obliterate the bequest to Murphy before his death. The Estate further argued that taking NRS 133.120(1)(a) at face value, Brown was permitted to obliterate the bequest outside Binion's presence.

A hearing was held on Murphy's Motion for Summary Judgment on December 18, 1998. Since NRCP 56 requires that for purposes of summary judgment all material facts must be assumed true, for purposes of the hearing the Court accepted as true Brown's representations that he revoked the codicil before Binion died. Therefore, assuming that the amendment or revocation occurred before Binion's death, the only issue before the Court was whether Binion's telephone call to his attorney was sufficient to revoke the gift to Murphy. Upon entertaining oral argument from both parties the Probate Court granted Sandra Murphy's Motion for Summary Judgment declaring the First Codicil to be valid.

In its Order filed December 28, 1998, the Probate Court determined that "a telephone call to decedent's attorney was not sufficient under the Nevada Revised Statutes to revoke or amend the Codicil executed by decedent on July 9,1998, and, as a result, the Codicil was in full force and effect on the date of decedent's death." Therefore, the Court "ordered that the First Codicil executed by Lonnie Ted Binion on July 9, 1998, in its entirety shall be admitted to probate."

An appeal was timely filed with the Supreme Court of Nevada, and that Court gave its Order on October 9, 2000, reversing the Order and Opinion of the State District Court.

REASONS FOR GRANTING THE WRIT

This is an issue of grave public concern. It turns on an individual's right to inherit under a Will free from biased claims of interested parties that could invalidate a successor's interest and the right of the testator to determine who inherits under his Will.

Additionally, this case raises an issue of first impression. The question raised deals with the application of the statute that was amended to correct an error in grammar – the word "or" for the word "and" – which changes the application of the law and precludes the holding rendered by the Nevada supreme court.

Appellant argues that the amended version of NRS 133.120 adopted by the state legislature in 1999 prior to the Nevada Supreme Court's ruling has a retrospective application since it was passed as a curative amendment.

CONCLUSION

The court should therefore grant the Writ of Certiorari in order to address the public concerns and to resolve important issues of law, the determination of a curative statute and its retrospective application.

Respectfully submitted,

/s/ Sandra Murphy

Sandra Murphy

Dated 5 January 2001

DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF LONNIE TED BINION,	)	
	)	Case no. P40663
Deceased.	)	

PETITION FOR PROBATE OF WILL, FOR APPOINTMENT OF EXECUTOR AND FOR LETTERS TESTAMENTARY TO ISSUE

The Petition of JACK B. BINION, respectfully shows:

1. That LONNIE TED BINION died testate on or about the 17th day of September, 1998, at Las Vegas, Nevada, and was at the time of his death, a resident of Las Vegas, Clark County, Nevada. A certified copy of the Death Certificate is attached hereto as Exhibit "A".

2. That at the time of his death, decedent left real and personal property in the State of Nevada of an estimated value IN EXCESS OF TWO HUNDRED THOUSAND DOLLARS ($200,000.00).

3. That decedent left a Last Will and Testament bearing the date of May 16, 1996, the original of which was filed with the Clerk of this Court, a copy of which is attached hereto as Exhibit "B", and by reference made a part of this petition. In that Last Will and Testament decedent left specific bequests to K.C. Harney, Mindy Michael Johnson, Aaron Claiborne, Marisa Beck, Janice Mahoney and Ulett Gonzaques. Decedent also specifically and intentionally omitted any provision for Damion Ted Sandoval. (In the Petition for Appointment of Special Administrator, the petitioner therein inadvertently attached a copy of a will executed by Mr. Binion bearing a date of April 18, 1995. The decedent had

revoked that earlier Will by his execution of the May 16, 1996 Will).

4. That decedent left a first Codicil to Last Will and Testament, bearing the date of July 9, 1998, the original of which was filed with the Clerk of this Court, a copy of which is attached hereto as Exhibit "C", and by reference made a part of this petition. In the Codicil, decedent deleted in their entirely all bequests to K.C. Harney, Mindy Michael Johnson, Aaron Claiborne, Marisa Beck, Janice Mahoney and Ulett Gonzaques. Decedent bequeathed to Sandra Murphy the sum of $300,000.00 "and the residence and contents located at 2408 Palomino, Las Vegas, Nevada."

5. On September 16, 1998, decedent directed James J. Brown to obliterate and cancel the bequest to Ms. Murphy. Decedent did so with the intention of revoking the bequest to Sandra Murphy. Decedent did not intend to cancel the remainder of the Codicil and did not intend to revive or give effect to any of the former bequests to K.C. Harney, Mindy Michael Johnson, Aaron Claiborne, Marisa Beck, Janice Mahoney or Ulett Gonzaques. Decedent intended by his directions to James J. Brown that decedent's daughter, BONNIE LEIGH BINION, take all of decedent's estate and that Sandra Murphy receive nothing from decedent's estate. The obliterations and cancellation by James J. Brown at the direction of decedent appears on Exhibit "C".

6. That JACK BINION is named as Executor under the decedent's Last Will and Testament and Codicil and is willing and able to act as Executor.

7. That Petitioner requests authority to invest any and all estate proceeds in money market mutual funds for cash management purposes.

8. That the names, ages and residence addresses of the heirs, next of kin, devisee and legatees of the decedent, so far as

known to the Petitioner, are as set forth below:

BONNIE LEIGH BINION, daughter, under 21 years of age
64660 Waggoner Dr.
Dallas, Texas 75230

DAMION SANDOVAL, son, adult
C/O Charles E. Kelly, Esquire
502 South Ninth Street
Las Vegas, Nevada 89101

Special Notice to:

STATE WELFARE ADMINISTRATOR
2527 North Carson Street
Capitol Complex
Carson City, Nevada 89710

WHEREFORE, Petitioner prays:

1. That the Clerk set a time for hearing of this Petition by the Court.

2. That notice of the time and place fixed for hearing of this Petition be given in the manner prescribed by law.

3. That the Last Will and Testament of the decedent, bearing date of May 16, 1996, and the Codicil bearing the date of July 9, 1998, as obliterated and canceled on September 16, 1998, be admitted to probate.

4. That JACK BINION be appointed Executor of the Estate, to serve without bond, and that Letters Testamentary be issued to them upon their taking the oath of office.

5. For such other and further relief as the Court may deem proper in the premises.

/s/
James J. Brown, Esq.

LAST WILL AND TESTAMENT
OF
LONNIE TED BINION

I, LONNIE TED BINION of Las Vegas, Nevada, being both of sound and disposing mind and memory, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all previous Wills, Codicils or Testamentary Dispositions heretofore made by me.

FIRST:

I direct that my just debts and funeral expenses be promptly paid out of the principal of my estate, or by such funds as may be provided for that purpose.

SECOND:

I hereby give and bequeath to the following persons the following sums:

a) K.C. HARNEY - FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS;

b) MINDY MICHAEL JOHNSON - FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS;

c) AARON CLAIBORNE - ONE HUNDRED THOUSAND ($100,000.00) DOLLARS;

d) DAMION SANDOVAL'S DAUGHTER, MARISA BECK - ONE HUNDRED THOUSAND ($100,000.00.) DOLLARS;

e) JANICE MAHONEY - ONE HUNDRED THOUSAND ($100,000.00) DOLLARS;

f) ULETT GONZAQUES - FIFTY THOUSAND ($50,000.00) DOLLARS.

THIRD:

I give, devise and bequeath unto my daughter, BONNIE LEIGH BINION all of the interest that I may have of which I may die seized or possessed, or to which I may be entitled at my demise, in and to the Horseshoe Operating Company and all the rest, residue and remainder of my estate not otherwise disposed

herein.

FOURTH:

In the event that my daughter shall not have attained the age of forty five (45) years at the time of my demise, then in that event I hereby nominate, constitute and appoint JACK BINION and JAMES J. BROWN, as Co-Trustees, and I hereby bequeath to them, in trust only, all of my Estate as set forth in Paragraph THIRD above, in the following manner:

I hereby give and grant unto the above-named Co-Trustees the full authority and power to invest and re-invest any portion of my estate as they may deem advisable from time to time and shall deem for the benefit of said trust estate, and I authorize and empower the said Co-Trustees, if deemed to be for the best interests of the trust estate, to make sale of any portion of said estate which shall come into their possession by virtue of this bequest, without first making application for authority therefore to the court. The aforesaid Co-Trustees are hereby directed to make available such sums as may be necessary for the care, support, maintenance, use, recreation and general welfare of my said child, said sums to be available to said child until such child shall reach the age of twenty-one (21) years, and upon such event, ten (10%) percent of the then trust estate, in whatever form it may be at said time, shall be distributed to my said child. An additional ten (10%) percent of the then trust estate, in whatever form it may be at said time, shall be distributed to my said child upon her attaining the age of twenty-five (25) years. An additional fifteen (15%) percent of the then trust estate, in whatever form it may be at said time, shall be distributed to my said child upon her attaining the age of thirty-five (35) years. During the continuance of said trust after my daughter shall have attained the age of twenty-one years, twenty-five years and thirty-five years, the Co-Trustees shall pay to my said child all of the net income of said trust in annual or more frequent installments, and such portion of the principal of said trust as the Co-Trustees deem necessary for my daughter's care, support, maintenance, use, recreation and general welfare after taking into consideration any other income or

resources of my child known to the Co-Trustees. Upon my said child attaining the age of forty-five (45) years, this Trust shall terminate and the residue of the trust estate, in whatever form it may be at that time, be distributed to my said daughter, BONNIE LEIGH BINION.

No interest in the principal or income of the trust created under this Will shall be anticipated, assigned, or encumbered, or subject to any creditor's claim or to legal process, prior to its actual receipt by the beneficiary.

FIFTH:

I have intentionally omitted any provision for my wife, DORIS BINION, as I have provided for her by a post-nuptial agreement. In the event my wife contests this provision I give her ONE DOLLAR ($1.00) and no more.

SIXTH:

I have intentionally omitted any provision for DAMION TED SANDOVAL, and in the event he contests this provision I give him ONE DOLLAR ($1.00) and no more.

SEVENTH:

I hereby nominate, constitute and appoint JACK BINION as Executor of this, my Last Will and Testament, and I direct and request that no bond or security be required of JACK BINION as such Executor nor as Trustee.

EIGHTH:

In the event that JACK BINION cannot act as said Executor and Trustee, or JAMES J. BROWN cannot act as Trustee, I nominate, constitute and appoint BRENDA SHARON BINION MICHAEL as Executrix of this, my Last Will and Testament and/or Co-Trustee and I direct and request that no bond or security be required of BRENDA SHARON BINION MICHAEL as such Executrix and/or Co-Trustee.

NINTH:

In the event that neither JACK BINION, nor his successor, BRENDA SHARON BINION MICHAEL cannot act as Executor nor Executrix, I nominate, constitute and appoint MINDY MICHAEL JOHNSON as Executrix of this my Last Will and Testament and I further, in the event the named co-trustees and successor trustee cannot act as Trustee, I nominate, constitute and appoint MINDY MICHAEL JOHNSON as Trustee and I direct and request that no bond or security be required of MINDY MICHAEL JOHNSON as such Executrix and/or Trustee.

TENTH:

In the event, DORIS BINION, shall predecease me, or in the event that we shall die simultaneously, or approximately so, and BONNIE LEIGH BINION shall not have attained the age of eighteen (18) years, then it is my desire that my niece, MINDY MICHAEL JOHNSON, be appointed Guardian of BONNIE LEIGH BINION. In the event that MINDY MICHAEL JOHNSON is unable to be Guardian to my daughter, then in that event it is my desire that my sister, BRENDA SHARON BINION MICHAEL be appointed Guardian. It is my desire that in no event shall either BECKY BEHNEN or NICHOLAS BEHNEN serve as a guardian of my daughter, BONNIE LEIGH BINION, or have any say in the management or control of her estate or person.

ELEVENTH:

I hereby direct that JAMES J. BROWN, ESQUIRE, represent my estate in any probate or any testate matters that may arise out of this my Last Will and Testament. I further direct that said JAMES J. BROWN, ESQUIRE, receive the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS in lieu of any statutory provision or other provision relating to attorney's fees for services rendered on behalf of the Estate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 16th day of May, 1996.

/s/
LONNIE TED BINION

The foregoing Will was signed and subscribed by the said LONNIE TED BINION, the person named therein, in Clark County, Nevada, on this 16th day of May, 1996, and was signed, sealed and declared by LONNIE TED BINION to be his Last Will and Testament in the presence of us, the undersigned, who thereupon and at his request, and in his presence, and in the presence of each other have hereunto subscribed our names as the attesting witnesses thereof the day and year first above written.

Sandra Murphy, residing at 2408 Palomino Lane, Las Vegas, Nevada.

Thomas T. Loveday, residing at 742 Rocky Trail Rd., Las Vegas, Nevada.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

On this 16th day of May, 1996, personally appeared SANDRA MURPHY and THOMAS T. LOVEDAY who, being first duly sworn, depose and say:

THAT, they witnessed the execution of the within Will of the within named Testator, LONNIE TED BINION; that they did subscribe the Will and declare the same to be his Last Will and Testament in his presence; that he thereafter subscribed the same as witnessed in the presence of the Testator, and in the presence of each other and at the request of the Testator; that the Testator

at the time of the execution of the Will appeared to them to be of full age and of sound mind and memory, and that they make this affidavit at the request of the said Testator.

/s/
Sandra Murphy

/s/
Thomas T. Loveday

Subscribed and Sworn to before me this 16th day of May, 1996.

/s/
James J. Brown
NOTARY PUBLIC
STATE OF NEVADA
County of Clark
My Commission Expires Oct 4,1999

BEST AVAILABL

~~FIRST~~ SECOND CODICIL

TO LAST WILL AND TESTAMENT OF

LONNIE TED BINION

I, LONNIE TED BINION, a resident of Las Vegas, Nevada, being of sound and disposing mind and memory, and not acting under duress, menace, fraud, restraint or undue influence of any person whatsoever, do hereby make, publish and declare this to be a Codicil to my Last Will and Testament dated May 16, 1996.

ARTICLE I

I hereby amend ~~Paragraph Second~~ of my Last Will and Testament by deleting ~~subparagraphs a through c and substituting the following:~~ Paragraph Second thereof in its entirety.

~~"I hereby give, devise and bequeath to SANDRA MURPHY the sum of THREE HUNDRED THOUSAND ($300,000.00) DOLLARS and the residence and contents located at 2408 Palomino, Las Vegas, Nevada".~~

ARTICLE II

I hereby ratify and confirm my said Last Will and Testament dated May 16, 1996, except insofar as the same is modified by this Codicil.

IN WITNESS WHEREOF, I, LONNIE TED BINION, have hereunto set my hand and seal this 9 day of July, 1998, at Las Vegas,

/ / / / /

/ / / / /

/ / / / /

C000012

BLE COPY

Nevada, in the presence of the undersigned, who, in my presence, at my request, and in the presence of each other hereunto affixed his name.

Lonnie Ted Binion
LONNIE TED BINION

Signed at the end hereof and published and declared by the above named Testator, LONNIE TED BINION, as and for a Codicil to his Last Will and Testament, in the presence of the undersigned, who, believing said Testatrix to be of sound and disposing memory, at his request, in his presence and in the presence of each other, have hereunto affixed our hands this 9 day of July, 1998.

Laura Berra residing at 9450 Palace
Jana L. Sullenberger residing at 7756 Painted Desert
L.V.

SUBSCRIBED and SWORN to before me this 9 day of July, 1998.

NOTARY PUBLIC

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
JAMES J. BROWN
My Appointment Expires Oct. 4, 1999

000013

DISTRICT COURT
CLARK COUNTY. NEVADA

In Re:	)	
	)	
The Matter of the Estate of	)	
	)	Case No. P40663
LONNIE TED BINION	)	
	)	
Deceased.	)	
	)	

HEARING DATE: November 6,1998
HEARING TIME: 9:30 a.m.

SANDRA MURPHY'S REQUEST FOR ENFORCEMENT OF WILL AND FIRST CODICIL THERETO DATED JULY 9,1998, FOR HEARING AND FOR DISQUALIFICATION OF ATTORNEY JAMES J. BROWN

COMES NOW, SANDRA MURPHY, by and through her attorneys Oscar B. Goodman, Esq., and David Z. Chesnoff, Esq., and makes this her Request for Enforcement of Will and First Codicil Thereto Dated July 9, 1998, for Hearing and for Disqualification of Attorney James L. Brown and in support thereof states the following:

1. That Decedent was a resident of Clark County, Nevada at the time of his death;

2. That Ms. Murphy is a resident of Las Vegas, Nevada having resided at 2408 Palomino Lane, Las Vegas, Nevada. 89107 since April 17, 1995;

3. That at the time of his death, decedent Lonnie "Ted" Binion left real and personal property to Ms. Murphy in a First

Codicil to Last Will and Testament bearing the date of July 9, 1998. According to the First Codicil to the Last Will and Testament the decedent bequeathed to Sandra Murphy the sum of Three Hundred Thousand Dollars ($300,000.00) and the residence and contents located at 2408 Palomino Lane, Las Vegas, Nevada."

4. Attorney James J. Brown attached to the Petition for Probate of Will, For Appointment of Executor and for Letters Testamentary to Issue, a copy of the codicil leaving the bequest to Ms. Murphy which codicil was designated in Mr. Brown's petition as Exhibit "C". Ms. Murphy puts this Honorable Court on notice that Mr. Brown improperly obliterated the First Codicil to Last Will and Testament of Lonnie 'Ted" Binion by writing on it and crossing out portions of the codicil so as to create the impression that be did so at a time contemporaneously with alleged instructions from Mr. Binion. In addition this was not done in Mr. Binion's presence. We have it upon information and belief that Mr. Brown did not make those obliterations until after Mr. Binion passed away. In addition we question the authority that Mr. Brown had to make markings on an original document, noting that the markings are neither witnessed by others nor initialed nor signed in any manner by Mr. Binion;

5. We contest the position of Mr. Brown that a revocation of the Codicil occurred as the alleged revocation did not conform to the provisions of N.R.S. 133.120.

6. We further object to Mr. Brown's participation as counsel in this matter. We object to his filing of the Petition for Probate of Will, For Appointment of Executor and for Letters Testamentary to Issue since Mr. Brown is a witness in this matter. He allegedly received telephonic instructions from Mr. Binion the day before Mr. Binion's passing to remove Ms. Murphy from the Codicil, contrary to the fact that Mr. Binion had repeatedly assured Ms. Murphy, and others, Ms. Murphy was to receive her share of the estate;

7. In addition, upon information and belief, we believe that attorney Brown's wife will also be a witness to the facts contained herein, and therefore it is inappropriate for Mr. Brown to proceed in his capacity as an attorney in this matter;

8. Mr. Brown and his wife will be witnesses as to Mr. Binion's state of mind concerning his alleged decision to remove Ms. Murphy from the First Codicil to the Will. Mr. Binion's capacity to make such a change, would certainly be affected by his mental condition.

WHEREFORE premises considered Sandra Murphy, by and through her attorneys Oscar B. Goodman and David Z. Chesnoff request that she receive that which was left to her by Mr. Binion, for a full hearing on all issues and for the disqualification of Mr. James J. Brown from proceeding as counsel in this matter,

And for other relief both of law and equity which the court deems just and fair.

DATED this _____ day of November, 1998.

Respectfully submitted,

GOODMAN, CHESNOFF & KEACH

by /s/_____
OSCAR B. GOODMAN. ESQ.

by /s/_____
DAVID Z. CHESNOFF, ESQ.

Attorneys for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF LONNIE TED BINION,	)	Case no. P40663
	)	Date: Nov. 6, 1998
Deceased.	)	Time: 9:30 a.m.

ORDER ADMITTING WILL TO PROBATE AND FOR ISSUANCE OF LETTERS

The Petition of JACK BINION, praying for admission of a Will to Probate and for Letters Testamentary, for the Estate of the above named Decedent, LONNIE TED BINION, having come on for hearing on the 6th day of November, 1998, before the undersigned, it appearing to the Court that the Decedent's Will bearing the date of May 16, 1996, having been duly executed and witnessed according to law, that notice of the hearing on the petition was duly given; that the Decedent at the time of his oath left an estate in Clark County, Nevada, and was then a resident of Clark County, Nevada, good cause appearing therefor, it is hereby ORDERED that the Will of the Decedent, bearing date of May 16, 1996 is admitted to probate and that the petitioner, JACK BINION, is appointed Executor of the Estate of the Decedent and that Letters Testamentary be issued to the Petitioner, JACK BINION, without bond.

IT IS FURTHER ORDERED that the Codicil dated July 9, 1998, is not being determined at this time;

IT IS FURTHER ORDERED that the objection filed by SANDRA MURPHY disputing the obliteration and cancellation of SANDRA MURPHY'S devise and bequest shall be heard by the Court selected at random in the normal course, allowing for discovery by the litigants;

IT IS FURTHER ORDERED that pending resolution of the Objection filed by SANDRA MURPHY the Executor shall deposit $300,000.00 in an interest bearing account and shall preserve the house and contents at 2408 Palomino, Las Vegas, Nevada, by maintaining twenty-four hour security guards;

IT IS FURTHER ORDERED that if SANDRA MURPHY objects to the legal representation of any parties involved in this Estate, SANDRA MURPHY shall file her petition for disqualification.

DATED this 9th day of November, 1998.

MYRON E. LEAVITT
DISTRICT JUDGE

Submitted by

/s/
JAMES J. BROWN, ESQ.
Attorney for Petitioner
Nevada Bar# 000160
830 East Charleston Blvd.
Las Vegas, Nevada 89104

DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF LONNIE TED BINION,	)	Case no. P40663
Petitioner.	)	

PLEADING OF JACK BINION AND JAMES BROWN TO MURPHY'S CONTEST OF OBLITERATION AND CANCELLATION OF BEQUEST IN CODICIL TO MURPHY

Jack B. Binion as the executor of the estate of Lonnie Ted Binion, and James Brown as Jack Binion's lawyer (collectively referred to as the "Binion Estate"), both interested persons under the will of Lonnie Ted Binion and pursuant to NRS § 137.010, plead to the contest by Sandra Murphy of the obliteration and cancellation of the bequest to Murphy in the Codicil of Ted Binion. The Binion Estate admits, denies and alleges as follows:

FIRST DEFENSE

1. Answering paragraphs 1, the Binion Estate admits the allegations.

2. Answering paragraph 2, the Binion Estate admits that from time to time Murphy resided in Ted Binion's home at 2408 Palomino Lane, in Las Vegas, Nevada. The Binion Estate denies any other allegation which is inconsistent with this pleading.

3. Answering paragraphs 3, 4, 5, 6, 7, and 8, to the extent that the allegations can be construed as allegations of fact, except as otherwise admitted in this paragraph, the Binion Estate denies the allegations. Further, to the extent that the allegations are construed as contentions of law, the Binion Estate denies the contentions. The Binion Estate admits that Mr. Brown and Mr. Brown's wife witnessed facts pertaining to Ted Binion's directions that Mr. Brown obliterate and cancel Murphy's bequest contained

in the codicil and that Mr. Brown and his wife may be witnesses in this contest. The Binion Estate also admits that Mr. Brown, in following Ted Binion's directions to obliterate and cancel Murphy's bequest, did so outside of Ted Binion's personal presence while Mr. Binion was still alive. The Binion Estate further admits that Ted Binion did not initial or sign the obliteration and cancellation of the bequest to Murphy.

DEMAND

The Binion Estate respectfully demands that the Court give nothing to Murphy by reason of her contest to the obliteration and cancellation of her bequest; that the Court enter judgment against Murphy and in favor of the Binion Estate, and that the Court release the house at 2408 Palomino and its contents and the $300,000.00 to be distributed to Bonnie Binion according to the terms of the Ted Binion's will. The Binion Estate further requests that the Court include within that judgment an award of attorneys' fees and costs which the Binion Estate has incurred in defending against Murphy's allegations.

Dated: November 10.1998

/s/
BRUCE JUDD

DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF LONNIE TED BINION,	)	CASE NO. P40663
	)	DEPT. NO. XII
Deceased.	)	

MOTION FOR SUMMARY JUDGMENT DECLARING THAT THE FIRST CODICIL TO WILL OF LONNIE TED BINION IS VALID; AND ORDER SHORTENING TIME

Date of Hearing; December 18, 1998
Time of Hearing; 10;00 a.m.

Pursuant to Rule 56 of the Nevada Rules of Civil Procedure, Sandra Murphy, through her attorneys, hereby moves this Court for entry of summary judgment whereby the First Codicil to the Last Will and Testament of Lonnie Ted Binion is hereby declared valid.

This Motion is based on the grounds that there is no genuine issue as to any material fact as to the validity of the First Codicil based upon the facts and law set forth below.

DATED this 9th day of December, 1998.

JOLLEY, URGA, WIRTH & WOODBURY
GOODMAN, CHESNOFF & KEACH

by /s/
R. Gardner Jolley, Esq.
Nevada Bar #266
3800 Howard Hughes Pkwy., #1600
Las Vegas, Nevada 89109
Attorneys for Sandra Murphy

ORDER SHORTENING TIME

Upon the Motion and Affidavit of R. Gardner Jolley, and good cause appearing;

IT IS HEREBY ORDERED that the time herein is shortened and the Motion for Summary Judgment is hereby set for hearing before the above-entitled Court in. Department XII, on the _____ day of December, 1998, at the hour of _____ ___.m.

DATED this _____ day of December, 1998.

_____
DISTRICT COURT JUDGE

AFFIDAVIT OF DAVID Z. CHESNOFF IN SUPPORT OF ORDER SHORTENING TIME

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

DAVID Z. CHESNOFF, being first duly sworn according to law, deposes and says:

I am an attorney duly licensed to practice law in the State of Nevada and am one of the attorneys for Sandra Murphy. I make this affidavit on personal knowledge, except as to those matters which are therein stated on information and belief and as to those matters, I believe it to be true, and am competent to testify to the matters contained herein.

A Petition for the Probate of Will of Lonnie Ted Binion, deceased, was filed on October 20, 1998, setting the hearing for November 6, 1998. Sandra Murphy, through her attorneys, requested that the First Codicil be enforced.

A hearing was held in chambers on November 6, 1998, resulting in an Order which withheld determination as to the validity of the First Codicil.

At the meeting in chambers. Judge Leavitt indicated that he would hear further matters regarding the claim of Sandra Murphy. Since Judge Leavitt will be leaving the District Court bench at the end of December 1998, affiant would request that an Order Shortening Time be granted to consider the validity of the First Codicil.

/s/
DAVID Z. CHESNOFF

POINTS AND AUTHORITIES

I.

INTRODUCTION

Lonnie Ted Binion ("Ted Binion"), the decedent, left a Last Will and Testament bearing the date of May 16, 1996. On July 9, 1998, he executed the First Codicil to Last Will and Testament, a copy of which was attached to the Petition for Probate of Will as Exhibit "C" and is attached hereto as Exhibit "1". In the First Codicil, decedent deleted in their entirety all bequests to K.C. Harney, Mindy Michael Johnson, Aaron Claiborne, Marisa Beck, Janice Mahone and Ulett Gonzaques. Decedent bequeathed to Sandra Murphy the sum of $300,000, "and the residence and contents located at 2408 Palomino, Las Vegas, Nevada."

On September 16, 1998, in a telephone call to Attorney James J. Brown, decedent purportedly requested that James J. Brown cancel the bequest to Ms. Murphy. Based upon the information received by Ms. Murphy, Mr. Brown did not attempt to remove Sandra Murphy by obliterating her bequest until after Ted Binion had passed away. See paragraph 4 of Sandra Murphy's Request for Enforcement of Will and First Codicil filed November 4, 1998 ("Request to Enforce Codicil").

It is the position of Sandra Murphy that Mr. Brown could not remove her from the First Codicil after the death of Ted Binion. Furthermore, even if the obliteration occurred before the death of the decedent, it was not done "in the presence of" Mr. Binion and, therefore, it is not valid as a revocation nor could his oral statements be sufficient to revoke the bequest to Sandra Murphy.

II.

THE FIRST CODICIL WAS VALID AND IN EXISTENCE AT THE TIME OF THE DEATH OF TED BINION

Based upon the information received by Sandra Murphy, at the time of the death of Ted Binion, the First Codicil had not been marked up by Mr. Brown and, therefore, was valid and in existence at the time of the death of Ted Binion.

A revocation takes place at the time it meets the requirements of NRS 133.120. Based upon the information received by Sandra Murphy, the purported revocation or obliteration occurred after the death of Ted Binion. Therefore, the revocation of the First Codicil as it relates to Sandra Murphy did not become effective until after the death of Ted Binion and, therefore, would not be valid. Cf. Shepard v. Gebo, 77 Nev. 226, 232, 361 P.2d 537 (1961).

A will that is destroyed after the testator's death is a not proper revocation. 2 Bowe, Parker, Page on Wills Section 21.30 (1960). In a similar case, Re Will of Mary W. Campbell, 138 A. 725 (Vt. 1927), the testator, a few hours before her death, instructed a third party to destroy her will. The will was not destroyed until after her death. The court concluded that the revocation was not effective since it had to be carried out during the lifetime of the testator.

Based upon the law set forth above, if the First Codicil was lined out after the death of Ted Binion to void the bequest to Sandra Murphy, such revocation was invalid.

III.
EVEN IF JAMES J. BROWN CHANGED THE CODICIL DURING THE LIFE OF TED BINION, THE REVOCATION WAS NOT VALIDLY EXECUTED

NRS 133.120(1) provides that no will can be revoked unless:

> (a) By burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence, or by his

direction; or

(b) By some other will or codicil in writing, executed as prescribed in this chapter.

Obviously, Ted Binion did not burn, tear, cancel or obliterate the Will himself and, therefore, that portion does not apply nor can the Executor rely on subsection (b), since there was no subsequent will or codicil in writing which was executed in conformity with the law of Nevada. The only basis for claiming that the Codicil was somehow amended or revoked is that Ted Binion intended to revoke it by obliterating portions of it "by some person in his presence, or by his direction." The Executor relies on the fact that the obliteration was done at the direction of Ted Binion, however, it is the position of Sandra Murphy that the statute requires that the obliteration be in the presence of Ted Binion and by his direction. Sandra Murphy is fully aware that. the statute uses the word "or" but this Court should be aware that every other statute in the United States uses the word "and." By way of example only, attached hereto as Exhibit "2" are the statutes of California, Oklahoma, Arizona, Colorado, New Mexico, Utah, Wyoming, Oregon, Washington, Kansas, Montana and Idaho. In addition, Section 2-507 of the Uniform Probate Code also uses the word "and", a copy which is included within Exhibit "2".

The statute regarding revocation was adopted by the legislatures of the United States from the Statute of Victoria, which provided that a will might be revoked by burning, tearing or destroying by the testator, "or by some person in his presence and by his direction." 2 Page on Wills Section 21.31 (1960). (Emphasis supplied)

It is submitted by Sandra Murphy that the use of the word "or" in NRS 133.120(1) (b) was a typographical error when the statute was first passed and, since it has never been challenged, no one ever corrected the statute to use the word "and" instead of "or". This is further verified by the fact that the Probate Revision Committee has amended NRS 133.120 to use the word "and,"

which has been forwarded to the Legislative Counsel for review by the 1999 Legislature (see Exhibit "3"). To make a valid will in Nevada, NRS 133.040 requires that the testator sign the will or the will be signed "by some person in his presence, and by his express direction." It is only logical that if a person can only make a will or codicil at the express direction and in the presence of the testator (NRS 133.040), that testator can only revoke the will or codicil in the same manner. To approve of an oral revocation by telephone in effect would allow an oral nuncupative codicil to cancel the bequest of Sandra Murphy. The law is clear, however, that under the statutes referred to above, oral words alone cannot revoke a written will. See 2 Page on Wills Section 21.37 (1960); see also In re Grattan's Estate, 138 P.2d 497 (Kan. 1943) where the court determined that a nuncupative will or codicil could not revoke a prior written will or codicil. The court in Grattan concluded that under the terms of the statute, a written will or codicil could not be revoked by the oral declaration of the testator, 138 P.2d at 500. The reason for this requirement is that the courts feel if a testator makes a will or codicil that complies with the requirements of a statute, it can only be revoked in the same manner and, thus, "oral declarations of revocation are wholly ineffectual under all circumstances." Id. at 500-501.

If we allow the testator to revoke his will by a telephone call, the court would never know if it was actually the intent of the testator or just a whim of the moment. This is especially true when Ted Binion died the following day.

Furthermore, the petition of the Executor ("Petition") indicates that the decedent did not intend to cancel the remainder of the Codicil whereby he deleted the bequests to K.C. Harney, Mindy Michael Johnson, Aaron Claiborne, Marisa Beck, Janice Mahone or Ulett Gonzaques. See paragraph 5 of Petition. The Executor cannot simply choose to revive a portion of the First Codicil, while attempting to revoke the portions relating to Sandra Murphy simply because the Executor on his own, makes the determination as to what Ted Binion wanted.

Destruction of a will by someone other than the testator, and not done in his presence, does not operate to revoke a codicil. Cf. Arbuckle Estate, 220 P.2d 950 (Cal. App. 1950); Hendrickson v. Wind, 178 P.2d 731 (Wash. 1947). A written will can only be altered or revoked in the manner provided by law. Lay v. Proctor, 34 P.2d 331 (Ore. 1934). Allowing an attorney to revoke a portion of a codicil based on a telephone call from his client, simply does not fit within the requirements of Nevada law for revocation.

IV.
CONCLUSION

There have been no challenges to the validity of the First Codicil when it was executed on July 9, 1998. The Executor instead has attacked the First Codicil as only being partially valid claiming that Ted Binion revoked it the night before he died by telephoning has attorney to cross out Sandra Murphy as a beneficiary. This telephone call to the attorney simply is not sufficient to revoke the Codicil.

Respectfully submitted,
JOLLEY, URGA, WIRTH & WOODBURY
GOODMAN, CHESNOFF & KEACH

By /s/_____
R. Gardner Jolley, Esq.
Nevada Bar #266
3800 Howard Hughes Pkwy., #1500
Las Vegas, Nevada 89109
Attorneys for Sandra Murphy

SECOND
~~FIRST~~ CODICIL

TO LAST WILL AND TESTAMENT OF

LONNIE TED BINION

I, LONNIE TED BINION, a resident of Las Vegas, Nevada, being of sound and disposing mind and memory, and not acting under duress, menace, fraud, restraint or undue influence of any person whatsoever, do hereby make, publish and declare this to be a Codicil to my Last Will and Testament dated May 16, 1996.

ARTICLE I

I hereby amend ~~Paragraph Secondeed~~ my Last Will and Testament by deleting ~~subparagraphs a through d and substituting the~~ Paragraph second thereof in its entirety. following:

~~"I hereby give, devise and bequeath to SANDRA MURPHY the sum of THREE HUNDRED THOUSAND ($300,000.00) DOLLARS and the residence and contents located at 2408 Palomino, Las Vegas, Nevada".~~

ARTICLE II

I hereby ratify and confirm my said Last Will and Testament dated May 16, 1996, except insofar as the same is modified by this Codicil.

IN WITNESS WHEREOF, I, LONNIE TED BINION, have hereunto set my hand and seal this 9 day of July, 1998, at Las Vegas,

/ / / / /
/ / / / /
/ / / / /

P00012

BEST AVAIL

Nevada, in the presence of the undersigned, who, in my presence, at my request, and in the presence of each other hereunto affixed his name.

Lonnie Ted Binion
LONNIE TED BINION

Signed at the end hereof and published and declared by the above named Testator, LONNIE TED BINION, as and for a Codicil to his Last Will and Testament, in the presence of the undersigned, who, believing said Testatrix to be of sound and disposing memory, at his request, in his presence and in the presence of each other, have hereunto affixed our hands this 9 day of July, 1998.

Laura Binion residing at 9450 Palazzo
Jerry L. Mullenburger residing at 7756 Painted Sunset L.V.

SUBSCRIBED and SWORN to before me this 9 day of July, 1998.

NOTARY PUBLIC

NOTARY PUBLIC STATE OF NEVADA County of Clark JEANNE A. BROWN My Appointment Expires Oct. 4, 1999

000013

ABLE COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF LONNIE TED BINION,	)	Case No. P40663
Petitioner.	)	

OPPOSITION OF JACK BINION AND JAMES BROWN TO MURPHY'S MOTION FOR SUMMARY JUDGMENT; AFFIDAVIT OF JAMES BROWN

Date of Hearing: December 18, 1998
Time of Hearing: 9:00 a.m.

Jack B. Binion as the executor of the estate of Lonnie Ted Binion, and James Brown as the lawyer for the executor, both as interested parties (collectively referred to as the "Binion Estate"), oppose the motion for summary judgment which Sandra Murphy served on the afternoon of December 11,1998. Although the Binion Estate has not been served with an order shortening the time for hearing Murphy's motion, the Binion Estate is filing this opposition based on the representations of Murphy's lawyers that the Court entered an order setting a hearing for December 18, 1998 at 9:00 a.m.

The Binion Estate opposes the efforts of Murphy to shorten the time to hear Murphy's motion. There is no reason for an order shortening time simply because this Court will be leaving the bench to take his seat on the Supreme Court. There is no explanation why Murphy waited until mid-December to file the motion for summary judgment.

Aside from the lack of support for an order shortening time and in opposition to the motion itself, the Binion Estate notes

first that Murphy lacks any affidavit to support her allegations at page 5: "Based upon the information received by Ms. Murphy, Mr. Brown did not attempt to remove Sandra Murphy by obliterating her bequest until after Ted Binion had passed away." (Emphasis in original.) The failure of any evidence dooms Murphy's motion. Rule 56, N.R.C.P., requires that the moving party support a motion for summary judgment with "depositions, answers to interrogatories, admissions, affidavits or other competent, admissible evidence." Murphy presents nothing except an argument signed by her lawyer. This Court should deny the motion on that ground alone.

Beyond the complete lack of any admissible factual support for Murphy's motion, the attached affidavit of James Brown discloses that in fact Mr. Brown received on September 16, 1998, Mr. Binion's telephonic instructions and directions to obliterate and cancel the bequest to Murphy and that Mr. Brown carried out those instructions and directions before Mr. Binion died under suspicious and untimely circumstances on September 17, 1998. That affidavit alone is sufficient to defeat summary judgment. Rule 56 requires all courts considering summary judgment motions to take great care. Johnson v. Steel, Inc., 100 Nev. 181, 678 P.2d 676 (1984). The court is obligated to accept as true all evidence favorable to the party against whom the motion is made. Hidden Wells Ranch, Inc v. Strip Realty, Inc., 83 Nev. 143, 425 P.2d 599 (1967). Summary judgment is foreclosed when there is the slightest doubt as to the operative facts. Washoe Medical Ctr., Inc. v. Churchill County, 108 Nev. 622, 836 P.2d 624 (1992).

Under the applicable standards. Murphy's motion fails. When Mr. Brown testifies that he obliterated the bequest to Ms. Murphy at the express instructions of Mr. Binion, and that he did so before Mr. Binion's death, his testimony ends the inquiry on the issues for purposes of summary judgment. Such testimony prevents summary judgment.

Murphy apparently argues in the alternative that even if

Mr. Brown followed the instructions of Mr. Binion and obliterated the bequest to Murphy, and did so before Mr. Binion's untimely and suspicious death, that the cancellation and revocation was ineffective as a matter of law because the obliteration did not occur in the presence of Mr. Binion. Of course Murphy admits that the statute, NRS § 133.120(1)(a), in exactly its same form for nearly 70 years, does not require that the obliteration occur in the presence of the testator and specifically provides that the obliteration need not be in the testators presence but may occur in the alternative simply "at the direction" of the testator. In striving to avoid the plain language of the statute which by itself defeats Murphy's motion, Murphy argues that the presence of a comma and the words "or by his direction" are all "typographical errors." (Motion at p. 7). Murphy argues that when the Nevada legislature plainly and without any ambiguity provided that a will could be revoked either by doing so "in [the testator's] presence, or by his direction" that what the Legislature really meant was "in his presence and by his direction". (Emphasis added.) Without anything more than her own argument, Murphy contends that the Legislature did not know the difference between the word "and" and the word "or." It does not end there because Murphy further contends that the Legislature does not know how to use commas.

Every part of Murphy's argument contravenes the rules of statutory construction in the State of Nevada and every other jurisdiction. Murphy's argument that § 133.120(1)(a) must be a typographical error concedes that the statute plainly and without ambiguity authorizes an obliteration and cancellation of a testamentary bequest at the direction of the testator but not in his presence. There is no other reading of the language of the statute. According to the repeated rulings of the Nevada Supreme Court: "When the language of a statue is plain, its intention must be deduced from that language." Hedlund v. Hedlund, 111 Nev. 325, 328, 890 P.2d 790 (1995). In Hedlund, the plaintiff sought to read a statute as permitting the district attorney's office to represent her to increase child support benefits. While the theory behind her efforts may have been reasonable, the language of the statute plainly did not permit such representation and the Court would not

go around the legislation.

In State, Dep't of Mtr. Vehicles v. McGuire, 108 Nev. 182, 827 P.2d 812 (1992), the Department of Motor Vehicles appealed a decision of the district court. McGuire contended that the statute permitting appeals, which did not include the word agency, precluded the appeal. The Nevada Supreme Court had no trouble reading the plain language of the statute which permitted "parties" to appeal, including the Department. 108 Nev. at 184.

In Randono v. CUNA Mutual Ins. Group, 106 Nev. 371, 793 P.2d 1324 (1990), an insured, who had received treatment for a blood pressure problem incorrectly answered an insurance application question regarding blood pressure. A statute stated that a false application prevented recovery under a policy if the premiums would have been higher with a correct application. In upholding the harsh result of no insurance when applying the statute as written, the Court explained:

> Under long established principles of statutory construction, when a statue is susceptible to but one natural or honest construction, that alone is the construction that can be given. . . . We have also consistently held that where there is no ambiguity in a statute, there is no opportunity for judicial construction and the law must be followed, regardless of result. . . . This means that if a statute clearly and unambiguously specifies the legislature's intended result, such result will prevail even if the statute is impractical or inequitable. .
>
> We are constrained by the above rules os statutory interpretation. The view with the most interpretational integrity and which takes the statutory language at face value is the view that concludes the statue means what is says despite its potential for incommensurate hardship. 106 Nev. at 375.

Further, the Court in a footnote stated "because there is a

controlling Nevada statute, the approach of other jurisdictions does not affect our determination here." 106 Nev. 374, n.2.

This Court should adopt the approach from Randono. Section 133.120(l)(a) is plain and unambiguous. It permits a testator to direct another person to obliterate and cancel a bequest outside the testator's presence. There is no other reading of the words of the statute. Murphy concedes the correctness of the Binion Estate's reading and argues instead that it is contrary to other jurisdictions and works a harsh result on her. The simple answer to her arguments is that answer given by the Court in Randono: taking the statute at its face means Mr. Binion could properly direct over the telephone Mr. Brown to obliterate and cancel the bequest to Murphy. In the light of the plain controlling Nevada statute, it does not matter what the statutes of other states provide and it does not matter if it works a harsh result on Murphy. The Court compels the application of plain statutes.

The final concession by Murphy that § 133.120(l)(a) permitted the obliteration of her bequest outside of the presence of Mr. Binion is her reference to the proposed "amendment" of the section to change the existing plain language with contrary language. Murphy, of course does not disclose who submitted the proposed language to the Probate Revision Committee. Likely, if it was, of any moment, which it is not, the Court would find Murphy's counsel behind the proposed amendment. The very need for a proposed amendment is proof positive that the statute as is currently exists is plain and unambiguous and permits the obliteration, cancellation and revocation by Mr. Brown at Mr. Binion's direction about which Murphy complains.

For all of the alternative and independent reasons set out in this opposition, the Binion Estate respectfully urges the Court to deny Murphy's motion for summary judgment.

Dated: December 16,1998

/s/
Bruce Judd

AFFIDAVIT OF JAMES BROWN

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

James Brown testifies as follows:

1. I am a lawyer representing the Estate of Lonnie Ted Binion and am one of the parties in interest in the contest by Sandra Murphy. I am competent to testify and have personal knowledge of the facts stated in this affidavit.

2. On September 16, 1998, Ted Binion called me on the telephone and instructed me to obliterate and cancel the bequest in his codicil to Sandra Murphy.

3. I complied with Mr. Binion's instructions prior to the time of Mr. Binion's death.

/s/
James Brown

DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF LONNIE TED BINION,	)	Case No. P40663
Deceased.	)	

NOTICE OF ENTRY OF ORDER

Date of Hearing: December 18, 1998
Time of Hearing: 10:00 a.m.

TO: JACK B. BINION and JAMES BROWN, ESQ.; and

TO: BRUCE JUDD, ESQ. of the law firm of Wright, Judd & Winckler, their attorneys; and

TO: BONNIE LEIGH BINION; and

TO: HARRY E. CLAIBORNE, ESQ., her attorney:

PLEASE TAKE NOTICE that on the 28th day of December, 1998, an Order Granting Motion for Summary Judgment was entered in the above-entitled matter, a true and correct copy of which is attached hereto as Exhibit "1".

DATED this 29th day of December, 1998.

JOLLEY, URGA, WIRTH & WOODBURY

by /s/
R. Gardner Jolley, Esq.
Nevada Bar # 466
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DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF LONNIE TED BINION,	)	Case No. P40663
Deceased.	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Date of Hearing: December 18, 1998
Time of Hearing: 10:00 a.m.

The Motion of Sandra Murphy for Summary Judgment Declaring that the First Codicil to Will of Lonnie Ted Binion is Valid, came on for hearing on December 18, 1998 at 10:00 a.m. before the above-entitled Court; R. Gardner Jolley, Esq. and Stefany A. Miley, Esq. of the law firm of Jolley, Urga, Wirth & Woodbury and Oscar B. Goodman, Esq. and Eckley M. Keach, Esq. of the law firm of Goodman, Chesnoff & Keach, appearing on behalf of Sandra Murphy; Bruce Judd, Esq. of the law firm of Wight, Judd & Winckler appearing on behalf of Jack B. Binion and James Brown, Esq.; Harry E. Claiborne, Esq. appearing on behalf of Bonnie Leigh Binion; the Court having reviewed the documents on file and hearing arguments of counsel; the Court finds that a telephone call to decedent's attorney was not sufficient under the Nevada Revised Statutes to revoke or amend the Codicil executed by decedent on July 9, 1998, and, as a result, the Codicil was in full force and effect on the date of decedent's death, and good cause appearing, it is hereby

ORDERED that the First Codicil executed by Lonnie Ted Binion on July 9, 1998, in its entirety shall be admitted to probate in conjunction with the Last Will and Testament of Lonnie Ted Binion dated May 16, 1996, which was admitted pursuant to

Court Order filed November 10, 1998.

DATED this 24th day of December, 1998

MYRON E. LEAVITT
DISTRICT COURT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF LONNIE TED BINION,	)	Case No. P40663
Petitioner.	)	

NOTICE OF APPEAL OF JACK BINION, JAMES BROWN AND BONNIE BINION

Jack B. Binion as the executor of the estate of Lonnie Ted Binion, James Brown as the lawyer for the executor, and Bonnie Binion give notice that they appeal to the Supreme Court of Nevada from the Order Granting Summary Judgment entered in this action on December 24, 1998.

Dated: January 19, 1999.

/s/
Bruce Judd

/s/
Harry E. Claiborne

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF LONNIE TED BINION.	)	No. 33669
JACK BIN ION, JAMES BROWN AND BONNIE BINION, Appellants,	)	FILED
vs.	)	OCT 09 2000
SANDRA MURPHY, Respondent.	)	

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting summary judgment in an action contesting the revocation of a bequest contained in a codicil to a will. Several months prior to his death, Lonnie Ted Binion ("Binion") executed a First Codicil to his will, revoking several specific bequests included within the will and adding a bequest to Sandra Murphy ("Murphy"). Prior to his death, Binion called his attorney and instructed his attorney to cancel the bequest to Murphy included in the First Codicil to his will. The following day, Binion died under suspicious circumstances.[1]

The estate argues that the district court erred by granting summary judgment on the ground that NRS 133.120 (1) (a) did

[1] For purposes of this order, appellants Jack Binion, as the executor for the estate of Lonnie Ted Binion, James Brown, as the lawyer for the executor, and Bonnie Binion, the daughter, heir, and legatee of Lonnie Ted Binion, will be referred to collectively as "the estate."

allow Binion to direct his attorney to obliterate and cancel a bequest over the telephone, outside the presence of Binion. Murphy responds that the district court correctly determined that cancellation of the bequest in the First Codicil solely at Binion's request by telephone is insufficient to revoke the bequest to Murphy, as the same formalities for executing a will or codicil should also be required to revoke it. We conclude that the estate is correct.

Summary judgment is only appropriate when, after a review of the record viewed in a light most favorable to the non-moving party, there remain no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Butler v. Bogdanovich, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985). "All of the non-movant's statements must be accepted as true, and a district court may not pass on the credibility of affidavits." Sawyer v. Sugarless Shops, 106 Nev. 265, 267-68, 792 P.2d 14, 15-16 (1990). This court's review of an order granting summary judgment is de novo. See Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989).

In granting Murphy's motion for summary judgment, the district court was called upon to determine whether a telephone call made by Binion to his attorney and the obliteration of the codicil by the attorney were sufficient under NRS 133.120(1)(a) to revoke the bequest to Murphy contained in the First Codicil of Binion's Will. At the time of Binion's death, the language of NRS 133.120(1) provided that a will could only be revoked:

> (a) By burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence, or by his direction; or
>
> (b) By some other will or codicil in writing, executed as prescribed in this chapter.[2]

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[2] The Nevada Legislature amended NRS 133.120 in 1999 to read:

> (a) By burning, tearing, canceling or obliterating

(Emphasis added.) The district court determined that "a telephone call to decedent's attorney was not sufficient under the Nevada Revised Statutes to revoke or amend the [First] Codicil executed by decedent on July 9, 1998, and, as a result, the [First] Codicil was in full force and effect on the date of decedent's death."

"Review in this court from a district court's interpretation of a statute is de novo." State, Dep't of Mtr. Vehicles v. Frangul, 110 Nev. 46, 48, 867 P.2d 397, 398 (1994). In interpreting statutes, "this court has long held that statutes should be given their plain meaning." Alsenz v. Clark Co. School Dist., 109 Nev. 1062, 1065, 864 P.2d 285, 286 (1993). The estate notes this court's statement in Hedlund v. Hedlund, 111 Nev. 325, 328, 890 P.2d 790, 792 (1995), that "when the language of a statute is plain, its intention must be deduced from that language."

The district court erred by granting Murphy's motion for summary judgment. We conclude that NRS 133.120 should be given its plain meaning. As drafted, NRS 133.120(1) (a) is a disjunctive sentence, which requires compliance with only one clause.[3] Therefore, the telephone call from Binion to his attorney, directing his attorney to cancel the First Codicil, together with the attorney's obliteration of the codicil would be sufficient to revoke the First Codicil "by his [Binion's] direction" if it occurred prior

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the same, with the intention of revoking it, by the testator, or by some person in his presence, or by his direction; or

(b) By some other will or codicil in writing, executed as prescribed in this chapter.

[3] Thus, we conclude that the 1999 legislative amendments to NRS 133.120 mark changes to, not clarifications of, existing law.

to Binion's death. NRS 133.120(1)(a).[4]

We therefore reverse the district court's order and remand this matter to the district court for further proceedings.[5]

It is so ORDERED.

/s/ _____, J.
Young

/s/ _____, J.
Maupin

/s/ _____, J.
Becker

cc: Hon. James C. Mahan, District Judge
Harry E. Claiborne
Wright Judd & Winckler
Jolley, Urga, Wirth & Woodbury
Goodman, Chesnoff & Keach
Clark County Clerk

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[4] Murphy also argues that Binion's actions created a second codicil; however, this issue was not raised before the district court. Accordingly, we will not consider this issue at this time. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (an issue not raised in the trial court is waived on appeal, unless the issue is jurisdictional).

[5] On May 24, 2000, subsequent to the docketing of this appeal, Sandra Murphy was convicted of the first-degree murder of Ted Binion. See NRS 134.007, in effect at the time of the death of this decedent: "Murderer ineligible to succeed to community or separate property of decedent"; see also Holliday v. McMullen, 104 Nev. 294, 295, 756 P.2d 1179, 1179 (1988) ("only a criminal conviction of murder will preclude an individual from succeeding to an estate").